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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/813,364	03/31/2004	Gregory R. Thune	059691-0114	5021
22428	7590	11/29/2006	EXAMINER	
FOLEY AND LARDNER LLP				PRICE, CARL D
SUITE 500				ART UNIT
3000 K STREET NW				PAPER NUMBER
WASHINGTON, DC 20007				3749

DATE MAILED: 11/29/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/813,364	THUNE ET AL.
	Examiner CARL D. PRICE	Art Unit 3749

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 18 September 2006.  
 2a) This action is **FINAL**.      2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-22 and 36-38 is/are pending in the application.  
 4a) Of the above claim(s) 2-7 and 10-22 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1, 8, 9, 36-38 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
     Paper No(s)/Mail Date \_\_\_\_\_.

4) Interview Summary (PTO-413)  
     Paper No(s)/Mail Date. \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_.

## DETAILED ACTION

### **Request for Continued Examination under 37 CFR 1.114**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on **09/18/2006** has been entered.

### **Response to Arguments**

Applicant's arguments with respect to claims **1, 8, 9** and **36-38** have been considered but are moot in view of the new ground(s) of rejection.

Applicant has amended the claims to be of a scope not previously considered. Consistent with applicant's argument that the prior art relied on in the previous office action fail to show, disclose and/or teach certain aspects of applicant's invention now recited in the claims filed on **01/03/2006** applicant has amended the claims to include at least the following the following:

**1. (Currently Amended) A candle container comprising:**

**a holder with a top rim;**

**a burn control cover with including a top surface with an exhaust hole formed therein, a rim configured to removably attach to the top rim of the holder and a lower ring extending vertically down from an interior surface of the burn control cover and extends extending below the top rim of the holder ~~when the burner control cover is attached to the holder; and~~**

**a fitment that is removably attached to the burn control cover, said the fitment being positioned between the burn control cover and the holder and configured to seal said the candle container; and**

**wherein the burn control cover and holder are configured to vent air into the holder at a circumference of the rim ~~of the holder~~.**

**36. (Currently Amended) A candle container comprising:**

**a holder with a top rim; and**

a burn control cover ~~with including~~ a top surface with an exhaust hole formed therein, ~~a rim extending along the circumference of the burn control cover and~~ configured to removably attach to the top rim of the holder and a lower ring extending vertically down from an interior surface of the burn control cover and ~~extends~~ extending below the top rim of the holder when the burn control cover is attached to the holder;

~~wherein the rim of the burn control cover further includes peaks and troughs defining air intake vents between the burn control cover and holder which are wherein the burn control cover and holder are cover~~ configured to vent air into the holder ~~of the candle container at a circumference of the rim of the holder; and~~

~~wherein the rim of the burn control cover includes peaks and troughs to define intake vents in the rim of the burn control device.~~

The following office action by the examiner is made in response to the new scope of the claimed invention. For example, **US001267475 (Stroble)** is now applied as the sole reference to reject claim, to address the limitation “a fitment removably attached to the burn control cover, the fitment being positioned between the burn control cover and the holder and configured to seal the candle container.”. The scope of the claimed invention being of such broadly recited and defined structure which not precluding structure such as the vertical wall (not referenced; figure 3) of element (8) in **US001267475 (Stroble)** reading on “a fitment removably attached to the burn control cover, the fitment being positioned between the burn control cover and the holder and configured to seal the candle container”. There being no point of reference recited in the claim which locates or more narrowly defines a position understood as “between”. Nor does the claim more narrowly defined to preclude the “fitment” from having features not necessarily located in the “between” position, such as the planar top planar surface (at 8) in **US001267475 (Stroble)**. See below.

With regard to the fitment being positioned between the burn control cover and the holder and configured to seal the candle container, claims **1, 8, 9 and 36-37** are rejected under 35 USC 112, second paragraph as being vague and indefinite. See below.

**Claim Rejections - 35 USC § 112**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 8, 9 and 36-37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In regard to claims 1 and 36, with regard to “the fitment being positioned between the burn control cover and the holder and configured to seal the candle container”, since it is not clear with regard to what aspect of the recited combination of related elements the fitment necessarily seals the “candle container”. That is, since the candle container is only defined by the arranged elements recited in the body of the claim, which includes the fitment itself. This causes the claim to be confusing since the claim appears to suggest the fitment is sealing itself, it being a part of the elements making up the candle container. In addition, it is noted that no one element in the body of the claim defines structure necessarily being capable of being sealed. While the preamble labels or names the invention as a “candle container” the body of the claim fails to, or falls short of, actually defining structure necessarily being that of a “container”. The broad recitation of a “holder with a rim” does not bring into the claim the necessary detail (e.g. – the holder having a bottom wall, integrated upstanding wall defining an inner container volume which is air tight and sealable but for an open top defined by a top rim edge of the upstanding wall ...). Indeed, it appears applicant’s claims are incomplete for omitting these essential elements and as such the claims are vague and indefinite by this omission amounting to a gap between the elements. See MPEP § 2172.01.

Claim 1 recites the limitation “the rim” in the last line. There is insufficient antecedent basis for this limitation in the claim.

Claim 36 recites the limitation “the circumference” in line 4. There is insufficient antecedent basis for this limitation in the claim.

**Claim Rejections - 35 USC § 102**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

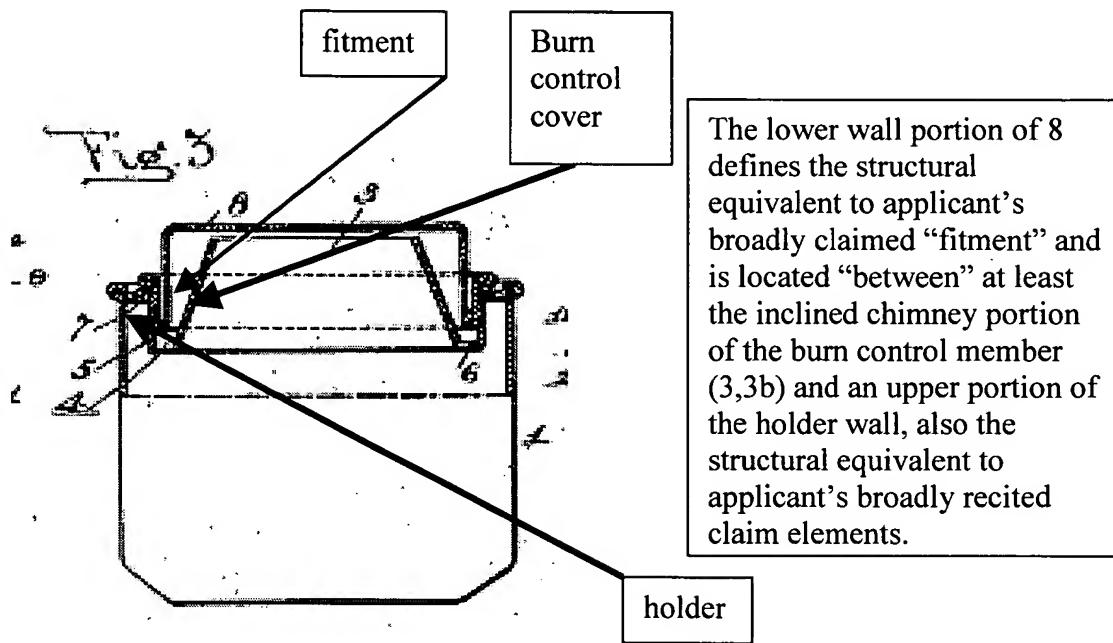
Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by **US001267475 (Stroble)**(of record).

**US001267475 (Stroble)** shows (figures 3 and 5) and discloses a container including:

- a holder (10) with a top rim (7);
- a removable burn control cover (3b) including a top surface with an exhaust hole (at 3b) formed therein,
- a rim or “flange” configured to removably attach to the top rim of the holder (The casing is provided at its upper edge with screw-threads 11 and the chimney (3b) is provided with a depending flange similarly threaded which will engage the first mentioned threads. The chimney may have a cap like that shown in Fig. 3”) and a lower ring (adjacent 4) extending vertically down from an interior surface of the burn control cover and extending below the top rim of the holder; and
- a fitment (the lower vertical wall portion of cap 8) removably attached to the burn control cover, the fitment being positioned between the burn control cover and the holder, at a location adjacent the upper rim of the holder and configured to seal the container; and
- wherein the burn control cover and holder are configured to vent air (at 4) into the holder at a circumference of the rim.

In regard to the recitation “a fitment removably attached to the burn control cover, the fitment being positioned between the burn control cover and the holder and configured to seal the container”, the lower wall portion of 8 defines the structural equivalent to applicant’s broadly claimed “fitment” and is located “between” at least the inclined chimney portion of the burn

control member (3,3b) and an upper portion of the holder wall, also the structural equivalent to applicant's broadly recited claim elements. Applicant's attention is directed to the following:



The recitation "candle container" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Additionally, the recitation "candle container" is deemed to be merely a statement of intended use given no patentable weight since the claim(s) fail to positively recite a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In this case, the holder of **US001267475 (Stroble)** is capable of containing a candle as the source of fuel for generating a flame. (In this regard note for example **US001705877 (Ramsey)** herein below which shows a holder of the general type recited in applicant's claims and containing a candle as the source of fuel for generating a flame.)

**Claims rejected under 35 U.S.C. 102(b)**

Claims 36-37 are rejected under 35 U.S.C. 102(b) as being anticipated by **US001705877 (Ramsey)**.

**US001705877 (Ramsey)** shows (Figures 1 and 6) and discloses candle container comprising:

- glass holder (1) with a top rim (at 2); and
- a burn control cover (3,10) having a top surface (10) with an exhaust hole formed therein, a rim (at 2) extending along the circumference of the burn control cover and configured to removably ( see threads at 2) attach to the top rim of the holder and a lower ring (lower 3) extending vertically down from an interior surface of the burn control cover and extending below the top rim of the holder when the burn control cover is attached to the holder;
- wherein the rim (at 2) of the burn control cover further includes peaks and troughs defining air intake vents (9) located between (i.e. – vertically) the burn control cover (10) and holder which are configured to vent air into the holder of the candle container.

**Allowable Subject Matter**

Claims 8 and 9 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

**Conclusion**

See the attached USPTO form 892 for prior art made of record and not relied upon which is considered pertinent to applicant's disclosure.

**USPTO CUSTOMER CONTACT INFORMATION**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CARL D. PRICE whose telephone number is (571) 272-4880. The examiner can normally be reached on Monday through Friday between 6:30am-3:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Josiah Cocks can be reached on (571) 272-4874. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CARL D. PRICE

Primary Examiner

Art Unit 3749

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